IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 769

THE GEMEX CORPORATION, a New Jersey corporation.

Petitioner.

vs.

A. C. BECKEN CO., an Illinois corporation.

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The Scheffer Press, Inc.—ANdover 3-6850

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Respondent has rejected Petitioner's statement of the case and has again urged by way of conclusion that in place of a simple refusal to deal there was an existing "price fixing and maintenance combination" (Respondent's Brief, pp. 2, 4, 5) or an "established price fixing agreement" (Respondent's Brief, p. 4). In its complaint (App. 4) and throughout the trial in the District Court and throughout its appeal, Respondent has continually urged that there has been some combination or conspiracy notwithstanding Finding 7 by the District Court (App. 135) and the opinion of the Court of Appeals (App. B, p. 8a). At this stage in the litigation Respondent again urges that Petitioner's premise of "refusal to deal" is not an issue (Respondent's Brief, p. 1).

There is no dispute in the record that Petitioner had adopted a policy under which it would no longer sell to price cutters. The Court of Appeals by way of its separate finding concluded that such a policy constituted an "illegal plan of doing business" (App. B, p. 8a), but failed to find that there was a "contract, combination in the form of trust or otherwise, or conspiracy" as condemned by Section 1 of the Sherman Act (App. A, p. 1a). The record references cited by Respondent (Respondent's Brief, p. 4) to support its contention that the Petitioner had actually entered into a price fixing combination can support nothing beyond a finding that Petitioner unilaterally apprised its customers of its policy in regard to price cutters. This record does not demonstrate a type of combination such as found in the *Parke, Davis* case, 28 L.W. 4150, 4153, where there had been an entwining of the wholesalers and retailers by a set program to promote compliance with a price maintenance policy.

Respondent continues to urge that Petitioner's announcement of its policy amounts to a price maintenance combination or conspiracy (Respondent's Brief, p. 7). It is submitted that under the *Colgate* doctrine a manufacturer may announce such a policy to the trade and attempt to obtain adherence by refusing to sell to those who do not respect its policy. The Government recognizes the validity of this transaction as stated in *U. S.* v. *Parke, Davis & Co.*, 28 L.W. 4150, where it is stated at page 4152:

> "The Government concedes for the purposes of this case that under the *Colgate* doctrine a manufacturer, having announced a price maintenance policy, may bring about adherence to it by refusing to deal with customers who do not observe that policy."

There is not a scintilla of evidence anywhere in this record to show that there was any combination or conspiracy between Petitioner and its competitors or between Petitioner and a group of its own wholesalers. Under the *Colgate* doctrine and under subsequent decisions in other Circuits[1] a manufacturer acting unilaterally and not in combination with any of its competitors can exercise its refusal to deal with a single distributor for reasons satisfactory to itself.

Respondent (Respondent's Brief, p. 9) states that the identical factual situation in this record was shown in two cases, one in the Second Circuit and one in the Sixth Circuit. A mere cursory examination of those decisions distinguishes this case, for in both of those decisions there were proven or alleged conspiracies between manufacturers, distributors and others. The mere announcement of policy that a manufacturer will refuse to deal with "price cutters" cannot amount to a fixing of a resale price on a competitor's product. It is the competitor who sets its price and the price cutting, as admitted in this case by Respondent's president (App. 42), is tantamount to promotion of one competitor's product over another manufacturer's product. This is sufficient reason in itself for a refusal to deal. The condemnation of such a business policy is directly contrary to the long recognized doctrine of the *Colgate* case.

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[1] **Nelson Radio & Supply Co. v. Motorola, Inc.**, 5 Cir., 1952. 200 F.2d 911, c.d. 345 U.S. 925; **Meyberg Co. v. Eureka Williams Corp.**, 9 Cir., 1954, 215 F.2d 100, c.d. 348 U.S. 875; **McElhenney Co. v. Western Auto Supply Co.**, (D.C. S.C., 1958) 167 F.Supp. 949.

Petitioner submits respectfully that the writ of certiorari should be granted.

Respectfully submitted,

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